Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

GALEN CLIFTON SHAWVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE ADMISSION OF EXTREMELY PREJUDICIAL BRUTON ERROR AGAINST A PRO SE DEFENDANT WHO WAS EFFECTIVELY DEPRIVED OF HIS RIGHT TO COUNSEL WAS PROPERLY HELD TO BE HARMLESS ERROR BEYOND A REASONABLE DOUBT WHEN SAID EVIDENCE WAS THE ONLY EVIDENCE IMPLICATING THE DEFENDANT IN THE GOVERNMENT'S FRAUD IN THE INDUCEMENT THEORY, PARTICULARLY WHERE PETITIONER FILED A PRE-TRIAL BRUTON MOTION AND THE GOVERNMENT FILED A RESPONSE THAT IT WOULD NOT ELICIT ANY BRUTON EVIDENCE, THEREAFTER RENEGING UPON THAT ASSERTION?

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OPINION BELOW

The unpublished opinion of the Fourth Circuit, rendered on September 5, 2002 is reprinted as Appendix A to this Petition.

STATEMENT OF SUPREME COURT JURISDICTION

The jurisdiction of the Supreme court is invoked under 28 U.S.C. Sec. 1254 (1) to review the decision rendered by the United States Court of Appeals for the Fourth Circuit on September 5, 2002.

CONSTITUTIONAL AMENDMENT INVOLVED

AMENDMENT VI states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Galen Shawver and two co-defendants, Clyde Beverly and Michael Cassidy, were charged in a twenty-five count indictment alleging criminal conspiracy as well as a series of fraud and money laundering offenses in the United States District Court for the Middle District of North Carolina. The indictment charged a conspiracy to commit mail and wire fraud; a second conspiracy to commit money laundering; ten substantive counts of mail fraud; three counts of wire fraud; and nine counts of money laundering.

Early in the proceedings, Petitioner began having difficulties with his assigned counsel, culminating in his pro se motion to discharge counsel on October 18, 2000, citing irreconcilable differences. The trial court granted the motion and set a trial date of October 30, 2000, forcing Petitioner to trial pro se. Petitioner moved pretrial to exclude statements by non-testifying co-defendants, or, in the alternative, to sever. The government responded that it had no intention of presenting Bruton evidence. Notwithstanding that assertion, a multitude of Bruton evidence, much of which was overlooked by the Fourth Circuit, was presented to the jury. The Fourth Circuit did in FN4 of the unpublished opinion find the Bruton issue to be preserved.

After a jury trial in October and November of 2000, the jury convicted Petitioner Shawver on all counts. Defendant Cassidy was convicted of both conspiracies and wire and mail fraud and acquitted of money laundering. Defendant Clyde Beverly was convicted of both conspiracies, wire and mail fraud and one count of money laundering.

Petitioner Shawver was the only defendant to testify, specifically denying that he was an originator or participant in the fraud in the inducement theory posed by the government. He testified that defendant Beverly had come up with the idea of doing international bank debenture trades and that he had rebuffed Beverly's overtures. Further testimony showed that Shawver had no further contact with Beverly until investor funds started arriving into an account controlled by Shawver. Both Shawver and a defense witness, Jeffrey Weiss, an attorney, advised that they then contacted U.S. Treasury authorities to report these suspicious activities.

Defendant Beverly's theory of defense was that all the illegal activities he committed were done at the direction of Petitioner Shawver. According to Beverly, who did not testify, Shawver told him what to do and say and when to do so. All of this evidence was elicited by the government in its examination of Agent Young concerning his interviews with Defendant Beverly. According to Agent Young, co-defendant Beverly's role was merely paperwork; Petitioner Shawver was the organizer and director of the plot to attract investors into a high yield trading program.

Beverly's interview by Agent Young was conducted in Oklahoma approximately one year after their initial contact at Beverly's home at a definitive time when Beverly knew that both he and Shawver were under investigation and that he stood to gain by inculpating Shawver. Curiously, the Fourth Circuit glossed over these statements while still finding that other Bruton error had, in fact, occurred. The opinion below found Bruton error in the admission of a letter that Beverly sent to investors several months after Beverly's initial conversation with the agents, wherein Beverly warned the investors of "fraud

by Mr. Shawver, the trustee." The opinion below found that Bruton error occurred, but concluded that the error was harmless. The opinion below did not even address the most egregious Bruton error whatsoever.

Petitioner Shawver contends that the ruling on the Bruton error was palliative in nature and failed to grasp the severity and impact of Beverly's accusations as recounted by law enforcement. Petitioner contends that the Bruton error was more than a paradigm and the Court's examination of the same was both laconic and somewhat an exercise in sophistry . Beverly's accusations, as recounted by Agent Young, constituted the only evidence that Shawver knowingly engaged in the illegal machinations of Beverly and Cassidy. Without this acknowledged Bruton error, a rational jury could have found Shawver not guilty of criminal activities. His actions would, perhaps, be found to be steeped in naivete and irrationality, but perhaps not criminality. It is not clear, beyond a reasonable doubt, that a rational jury would have found the Petitioner guilty absent the error.

STATEMENT OF JURISDICTION OF UNITED STATES COURT OF APPEALS BELOW

The Court of Appeals for the Fourth Circuit has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

In its decision in the present case, the Court of Appeals found what it terms a paradigmatic Bruton violation by the admission of evidence that Beverly sent a letter to investors warning them of "fraud by Mr. Shawver, the trustee". It further

found that Beverly knew of an investigation and that he stood to gain by inculpating Shawver. Accordingly, Shawver's Sixth Amendment confrontation rights were violated. This error, however, was not the only nor the main Bruton error that occurred. Beverly also told Agent Young that all the money would be directly wired to Shawver, who was the organizer and director of the plot to attract investors. According to Beverly, as related to the jury by Agent Young, Shawver told him exactly what to do and directed all of his activities within the plot. This testimony represented Bruton error at its apogee and its admission by the government was close to perjorative in nature. There was no other evidence of this nature that makes it merely cumulative and thus harmless beyond a reasonable doubt.

The Fourth Circuit incorrectly found that, in addition to the Bruton error, there was a "wealth of condemnatory evidence" against Shawver. United States v. Crockett, 813 F.2d 1310, 1315-16 (4th Cir. 1987).

Shawver's defense was that any withdrawals of investor's funds from his accounts were to pay valid trust expenses or legitimate "ledger transfers" backed by an emerald he owned. He also presented evidence of a loan from Louis Chilelli of over $1,500,000 to do with as he wished. Shawver's usage of funds was well below this figure, thus enabling a jury to conceivably find that Petitioner did not use investor funds. The central theme of Petitioner's defense was that he did not participate in inducing investors to place funds in the Emerald Green Pension Fund's account at Centura Bank and that he was traveling in Europe when most of the investor funds came into the account. As far as the emerald was concerned, the Court stated that "Shawver never produced this fabled gem" when, in

fact, he could not possibly do so because the emerald was, at the time of trial, in the possession of an attorney named Joseph Burns, who was serving as the trustee for Shawver and his company's bankruptcies. Perhaps it was Shawver's pro se status that prevented him from proving the emerald's existence to the jury; the fact remains that such a gem does exist.

In Crockett (supra), the Court found harmless error in refusing to allow the defendant to cross-examine a co-defendant as to a statement that the defendant had been spending money freely in view of the wealth of condemnatory evidence against the defendant. That evidence included drug sales directly from Crockett to government agents and is readily distinguishable from the case sub judice.

The Court of Appeals relied upon Harrington v. California, 395 U.S. 250 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) for the proposition that a harmless error analysis applies to Bruton violations. While Petitioner concedes that to be a correct statement of the law, in Harrington there was overwhelming untainted evidence to support the conviction, unlike the case sub judice. The Harrington court said that its own examination of the evidence in the record found the evidence to be so overwhelming that "unless we can say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed." Id. P. 254. In Harrington, the defendant made statements which fell short of a confession but placed himself at the scene of the crime. Several eyewitnesses placed him at the scene also. Harrington was a white man and his three co-defendants were black. Two of the black men's confessions made reference not to Harrington by name but to "the white guy". Harrington, of course, was sitting at the defense table with three black men, all

of whom confessed. Petitioner suggests that Harrington is readily distinguishable and does meet the "overwhelming evidence" test.

The Court of Appeals correctly relied upon Lee v. Illinois, 476 U.S.530, 106 S.Ct. 2056 (1986), in finding Bruton error in Beverly's statements as recited to the jury by Agent Young. Simply put, the jury's reliance on these statements in the case at bar as substantive evidence against Shawver violated his rights under the Confrontation Clause of the Sixth Amendment. The Lee Court went on to say:

> (A) The right of cross-examination is included in an accused's right to confront the witness against him; the right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. This truth finding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a defendant without the benefit of cross-examination, since such a confession is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally, and since the accomplice may have a strong motivation to implicate the defendant and to exonerate himself. Thus, accomplices' confessions that incriminate defendants are presumptively unreliable. Pp 2061-2063.

In Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999) this Court reversed a capital murder conviction and death sentence due to the erroneous admission of a non-

testifying accomplice's confession. This Court referred to the right of cross-examination as "the greatest legal engine ever invented for the discovery of the truth" Id. P. 116. Further, accomplices' confession that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule, as that concept has been defined in Confrontation Clause jurisprudence.

In Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 91998), this Court held that the Bruton rule prohibiting introduction during a joint trial of the confession of a non-testifying co-defendant which names the defendant as a perpetrator extends also to redacted confessions in which the name of the defendant is replaced by a blank space, the word "deleted", or some similar symbol.

The most damning Bruton error which was not discussed by the Court of Appeals was not Beverly's letter to investors but rather his remarks to the investigating agents that Petitioner was the mastermind and organizer and himself merely an unwitting dupe. These statements were made when Beverly well knew of the pending investigation and squarely constitute Bruton violations.

It is suggested that when a Court of Appeals overlooks major error of constitutional magnitude while simultaneously recognizing that some Bruton error did occur, it is the Honorable court's duty to correct such an error.

In Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714 (1987), this Court held that where a non-testifying co-defendant's confession which incriminated a co-defendant was presented at a joint trial, the Confrontation Clause barred its

admission, even though the jury was given a limiting instruction and the incriminated defendant had, himself, confessed. In the case sub judice, the trial court gave no limiting instruction regarding Beverly's statements to the agents and the Petitioner certainly never confessed to any crime committed by himself. The decision sub judice is in conflict with this Honorable Court's precedent.

Agent Young's relation of Clyde Beverly's inculpatory statements clearly named Shawver not just in name alone, but also as the mastermind and organizer of the criminal activity on trial. Compounding this error, as found by the Court of Appeals, was additional and even more damning Bruton error that the Court failed to discuss and presumably, to utilize, in its determination that the identified Bruton error was harmless. Culminating this scenario was the government's avoidance of its earlier filed response not to rely upon Bruton evidence in this case. The last step, and perhaps a legally fatal one, is that the government was proceeding against Petitioner Shawver pro se. It has been said, and wisely so, that justice is not a result, but indeed, a process. The process of justice was fundamentally flawed in this case. Petitioner's conviction should be reversed and a fair trial held.

CONCLUSION

Petitioner Galen Clifton Shawver, for the reasons set forth above, respectfully petitions this Honorable Supreme Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review these serious questions and the standards to be utilized in analyzing what Bruton violations can truly said to be harmless error beyond a reasonable doubt.

This the _____ day of December, 2002.

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